

JS 44 (Rev. 12/07) (CAND Rev 1/10)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

Albert Dytch

DEFENDANTS

Nativida Ramos

(b) County of Residence of First Listed Plaintiff **Alameda**
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant **Alameda**
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Thomas N. Stewart, III
369 Blue Oak Lane
Clayton, Ca 94517

Attorneys (If Known)

C11-489 MEJ

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 660 Occupational Safety/Health	SOCIAL SECURITY	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	LABOR	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 510 Selective Service
<input type="checkbox"/> 190 Other Contract	REAL PROPERTY	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 520 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability	CIVIL RIGHTS	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 530 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 540 Other Statutory Actions
	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 740 Railway Labor Act	FEDERAL TAX SUITS	<input type="checkbox"/> 550 Agricultural Acts
	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 560 Economic Stabilization Act
	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 570 Environmental Matters
	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	IMMIGRATION		<input type="checkbox"/> 580 Energy Allocation Act
	<input checked="" type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 462 Naturalization Application		<input type="checkbox"/> 590 Freedom of Information Act
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
		<input type="checkbox"/> 465 Other Immigration Actions		<input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 USC 12101

Brief description of cause:

ADA Title III

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND

☐ SAN JOSE

☐ EUREKA

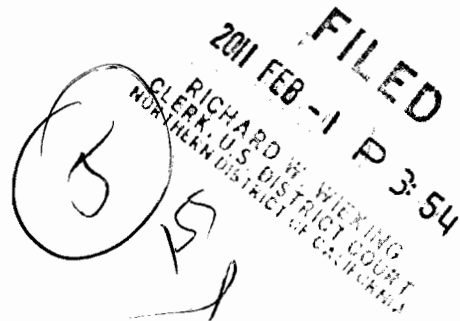
DATE

January 31, 2011

SIGNATURE OF ATTORNEY OF RECORD

[Signature]

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Attorneys for Albert Dytch



ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 11

0489

MEJ

ALBERT DYTCH,

Case No. CV 11-
Civil Rights

Plaintiff,

v.

NATIVIDA RAMOS,

COMPLAINT FOR PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF AND
DAMAGES: DENIAL OF CIVIL RIGHTS AND
PUBLIC FACILITIES TO PHYSICALLY
DISABLED PERSONS (CIVIL CODE §§
51, ET SEQ.; INJUNCTIVE RELIEF PER
TITLE III, AMERICANS WITH DISABILITIES
ACT OF 1990

Defendants.

Plaintiff, Albert Dytch, alleges:

FIRST CLAIM FOR RELIEF: DAMAGES AND INJUNCTIVE RELIEF
FOR DENIAL OF FULL AND EQUAL ACCESS TO A PUBLIC ACCOMMODATION:
PUBLIC FACILITIES AT A RESTAURANT (Civil Code §§ 51, ET SEQ.)

1. Plaintiff, suffers from muscular dystrophy, does not have the substantial use of his legs and is a "person with a disability" and "physically handicapped person". Plaintiff requires the use of a wheelchair for locomotion and is either unable to use portions of public facilities which are not accessible to disabled persons who require the use of a wheelchair or is only able to use

1 such portions with undue difficulty.

2 2. The LaBorinquena Mexi-catessen Restaurant/Grocery Store located at 582 7th Street,
3 Oakland, California (the Restaurant) is a restaurant and grocery store which is open to the
4 public. Defendant owns the real property where the Restaurant is located and/or operates the
5 Restaurant.

6 3. Summary of facts: This case involves the denial of access to Plaintiff and others similarly
7 situated at the Restaurant on March 31, 2010. Plaintiff was denied equal protection of the law
8 and was denied Civil Rights under both California law and federal law, as hereinbelow
9 described. Plaintiff was denied his rights to full and equal access at the Restaurant because of
10 an inaccessible restroom, all of which made the Restaurant not properly accessible to Plaintiff
11 and to others similarly situated. Plaintiff seeks injunctive relief to require Defendants to correct
12 those barriers, to comply with ADAAG and the CBC where required, to remove all barriers to
13 access in the Restaurant which are readily achievable, to make all reasonable accommodations
14 in policy in order to enable Plaintiff and others similarly situated to use the Restaurant and at
15 minimum, to use readily achievable alternative methods to enable Plaintiff to use the goods and
16 services which the Restaurant makes available to the non-disabled public. Plaintiff also seeks
17 the recovery of damages for his personal damages involved in the discriminatory experiences
18 on March 31, 2010, and seeks recovery of reasonable attorney's fees and litigation expenses and
19 costs according to statute.

20 4. Jurisdiction: This Court has jurisdiction of this action pursuant to 28 USC § 1331 for
21 violations of the Americans with Disabilities Act of 1990, 42 USC 12101 et seq. Pursuant to
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1 supplemental jurisdiction, attendant and related causes of action arising from the same facts are
2 also brought under California law, including but not limited to violations of California Civil
3 Code §§ 51, 54, 54.1 and 55.

4 5. Venue: Venue is proper in this Court pursuant to 28 USC 1391(b) and is founded on the fact
5 that the location where Plaintiff experienced his discrimination is located in this district and
6 that Plaintiff's causes of action arose in this district.

7 6. Intradistrict: This case should be assigned to the San Francisco intradistrict because the
8 incident occurred in, and Plaintiff's rights arose in, the San Francisco intradistrict.

9 7. The Restaurant is a "public accommodation or facility" subject to the requirements of
10 California Civil Code § 51, 54, 54.1 and 55.

11 8. Placeholder.

12 9. Defendants are and were the owner, operator, manager, lessor and lessee of the subject
13 Restaurant at all times relevant herein. Plaintiff is informed and believes that each of the
14 Defendants is and was the agent, employee or representative of each of the other Defendants,
15 and performed all acts and omissions stated herein within the scope of such agency or
16 employment or representative capacity and is responsible in some manner for the acts and
17 omissions of the other Defendants in proximately causing the damages complained of herein.

18 10. Plaintiff and others similarly situated are disabled persons who require the use of a
19 wheelchair and are unable to use public facilities on a "full and equal" basis unless each such
20 facility is in compliance with the provisions of the Americans with Disabilities Act of 1990 and
21 the regulations thereof. Under Civil Code §§ 51 and 54.1, Defendants were required to comply
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1 with the requirements of the Americans with Disabilities Act of 1990 and the federal
2 regulations adopted pursuant thereto. The acts and omissions of which Plaintiff complains took
3 place at the Restaurant.

4 11. Civil Code §§ 51, et seq., were enacted to prohibit discrimination against people with
5 disabilities and to encourage the full and free use by people with disabilities of public facilities
6 and other public places. CC §§ 51 states that a violation of the Americans with Disabilities Act
7 of 1990 is a "violation of this section" and that "full and equal access" to public
8 accommodations and that such access means that which meets the standards of Titles II and III
9 of the Americans with Disabilities Act of 1990 and federal regulations adopted pursuant
10 thereto; CC § 52 states that minimum damages for discrimination are \$4,000 for each incidence
11 of discrimination and states that a defendant who denies or interferes with a disabled person's
12 rights of access is liable for actual damages and attorneys' fees.

13 12. Health & Safety Code § 19955 was enacted "To ensure that public accommodations or
14 facilities constructed in this state with private funds adhere to provisions of Chapter 7
15 (commencing with § 4450) of Division 5 of Title 1 of the Government Code." Such public
16 accommodations include those which are the subject of this action. On information and belief,
17 Title 24 California Code of Regulations, formerly known as the California Administrative
18 Code, was in effect at the time of construction and of each alteration of work, all of which
19 occurred after July 1, 1982, thus requiring access complying with the specifications of title 24
20 for all such construction and for each such "alteration, structural repair or addition".

21 13. The Restaurant's men's restroom door is narrow. The toilet lacks grab bars and is
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1 inaccessible.

2 On March 31, 2010, Plaintiff patronized the Restaurant. Although Plaintiff wanted to
3 use the men's restroom, went into the men's restroom, but was unable to use the toilet because
4 of the lack of grab bars.

5 As a result, Plaintiff is entitled to statutory damages in an amount according to proof.

6 14. Defendant's failure to have an accessible entrance and an accessible restroom, remove all
7 readily achievable barriers, institute policies in furtherance of accessibility or at least have an
8 alternate policy to enable Plaintiff to use the goods and services offered to the non-disabled
9 public without having to suffer the indignities, as aforesaid, was a violation of the California
10 Building Code, the Americans with Disabilities Act and federal regulations adopted pursuant
11 thereto, and as a consequence, was a violation of Civil Code §§ 51, et seq.

12 15. Injunctive relief: Plaintiff seeks injunctive relief to prohibit the acts and omissions by
13 Defendant at the Restaurant as stated above which appear to be continuing, and which have the
14 effect of wrongfully excluding Plaintiff and others similarly situated from using the Restaurant.
15 Plaintiff will patronize the Restaurant again once the barriers are removed. Such acts and
16 omissions are the cause of humiliation and inconvenience of Plaintiff in that these actions
17 continue to treat Plaintiff as an inferior and second class citizen and serve to discriminate
18 against Plaintiff on the sole basis that Plaintiff is a person with a disability and requires the use
19 of a wheelchair for movement in public places. Plaintiff is unable so long as such acts and
20 omissions of Defendant continue, to achieve equal access to and use of this public facility. The
21 acts of Defendant have proximately caused and will continue to cause irreparable injury to
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1 Plaintiff if not enjoined by this Court.

2 16. Damages: As a result of the denial of equal access to the Restaurant and due to the acts and
3 omissions of Defendants and each of them in owning, operating and/or leasing the Restaurant,
4 Plaintiff suffered a violation of Civil Rights including but not limited to rights under Civil Code
5 §§ 51, et seq., and suffered mental and emotional distress, all to Plaintiff's damages.

6 Defendant's actions and omissions to act constituted discrimination against Plaintiff on the sole
7 basis that Plaintiff was physically disabled and unable to use the facilities on a full and equal
8 basis as other persons. Plaintiff seeks the minimum damages of \$4,000 pursuant to CC § 52.

9 17. Fees and costs: As a result of Defendant's acts, omissions and conduct, Plaintiff has been
10 required to incur attorney's fees, litigation expenses, and costs as provided by statute, in order
11 to enforce Plaintiff's rights and to enforce provisions of the law protecting access for disabled
12 persons and prohibiting discrimination against disabled persons. Plaintiff therefore seeks
13 recovery of all reasonable attorney's fees and costs, pursuant to the provisions of Civil Code §§
14 52, et seq. Additionally, Plaintiff's lawsuit is intended not only to obtain compensation for
15 damages to Plaintiff, but also to force the Defendants to make their facilities accessible to all
16 disabled members of the public, justifying "public interest" attorney's fees, litigation expenses
17 and costs pursuant to Code of Civil Procedure § 1021.5.

18 18. Wherefore, Plaintiff asks this Court to preliminarily and permanently enjoin any continuing
19 refusal by Defendants to comply with the requirements of the Americans with Disabilities Act
20 of 1990 and regulations adopted pursuant thereto with respect to access of disabled persons to
21 the Restaurant; for statutory damages pursuant to CC § 52; and for attorneys' fees and costs
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1 pursuant to CC §§ 52, and 1021.5.

2 SECOND CLAIM FOR RELIEF:
 3 VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990
 4 42 USC §§ 12101 FF

5 19. Plaintiff realleges the allegations of paragraphs 1-18 hereof.

6 20. Pursuant to law, in 1990 the United States Congress made findings per 42 USC §12101
 7 regarding physically disabled persons, finding that laws were needed to more fully protect
 8 "some 43 million Americans [with] one or more physical or mental disabilities"; that
 9 "historically society has tended to isolate and segregate individuals with disabilities"; and that
 10 "such forms of discrimination against individuals with disabilities continue to be a serious and
 11 pervasive social problem"; that "the Nation's proper goals regarding individuals with disabilities
 12 are to assure equality of opportunity, full participation, independent living and economic self
 13 sufficiency for such individuals"; and that "the continuing existence of unfair and unnecessary
 14 discrimination and prejudice denies people with disabilities the opportunity to compete on an
 15 equal basis and to pursue those opportunities for which our free society is justifiably famous ..."

16 21. Congress stated as its purpose in passing the Americans with Disabilities Act (42 USC
 17 §12101(b)):

18 It is the purpose of this act

19 (1) to provide a clear and comprehensive national mandate for the elimination of
 20 discrimination against individuals with disabilities;

21 (2) to provide clear, strong, consistent, **enforceable standards** addressing discrimination
 22 against individuals with disabilities;

23 (3) to ensure that the Federal government plays a central role in enforcing the standards
 established in this act on behalf of individuals with disabilities; and

(4) to invoke the sweep of Congressional authority, including the power to enforce the 14th Amendment and to regulate commerce, in order to address the major areas of ***discrimination faced day to day*** by people with disabilities (emphasis added).

22. As part of the Americans with Disabilities Act, Public Law 101-336 (hereinafter the "ADA"), Congress passed "Title III - Public Accommodations and Services Operated by Private Entities" (42 USC 12181 ff). Among "private entities" which are considered "public accommodations" for purposes of this Title is a Restaurant (Regulation 36.104).

23. Pursuant to §302, 42 USC §12182, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases or leases to, or operates a place of public accommodation."

24. Among the specific prohibitions against discrimination were included:

§12182(b)(2)(A)(ii): "A failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities ...";

§12182(b)(A)(iii): "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied service, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services ..."; ***§12182(b)(A)(iv)***:

"A failure to remove architectural barriers and communication barriers that are structural in nature, in existing facilities ... where such removal is readily achievable"; ***§12182(b)(A)(v)***:

"Where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or

1 accommodations available through alternative methods if such methods are readily achievable".
2 The acts and omissions of Defendants set forth herein were in violation of Plaintiff's rights
3 under the ADA, Public Law 101-336, and the regulations promulgated thereunder, 28 CFR Part
4 36ff.

5 25. The removal of each of the barriers complained of by Plaintiff as hereinabove alleged, were
6 at all times herein mentioned "readily achievable" under the standards of the Americans With
7 Disabilities Act. Because the Restaurant was not accessible, Defendants had an obligation to
8 have some sort of plan which would have allowed Plaintiff to enjoy the Restaurant's services
9 without having to suffer the indignities as aforesaid.

10 26. Pursuant to the Americans with Disabilities Act, 42 USC 12188ff, §308, Plaintiff is
11 entitled to the remedies and procedures set forth in §204(a) of the Civil Rights Act of 1964, 42
12 USC 2000(a)-3(a), as Plaintiff is being subjected to discrimination on the basis of disability in
13 violation of this Title or has reasonable grounds for believing that he is about to be subjected to
14 discrimination in violation of §12182. On information and belief, Defendants have continued
15 to violate the law and deny the rights of Plaintiff and of other disabled persons to access this
16 public accommodation since on or before March 31, 2010. Pursuant to §12188(a)(2), "In cases
17 of violations of §12182(b)(2)(A)(iv) ... injunctive relief shall include an order to alter facilities
18 to make such facilities readily accessible to and usable by individuals with disabilities to the
19 extent required by this title."

20 27. Plaintiff seeks relief pursuant to remedies set forth in §204(a) of the Civil Rights Act of
21 1964, (42 USC 2000(a)-3(a), and pursuant to Federal Regulations adopted to implement the
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1 Americans with Disabilities Act of 1990. Plaintiff is a person for purposes of Section 12188(a)
2 of the ADA who is being subjected to discrimination on the basis of disability in violation of
3 Title III and who has reasonable grounds for believing he will be subjected to such
4 discrimination each time that he may attempt to patronize the Restaurant.

5 Wherefore Plaintiff prays for relief as hereinafter stated:

6 PRAYER

7 1. Issue a preliminary and permanent injunction directing Defendants to modify its
8 facilities as required by law to comply with the ADAAG and the CBC where required, remove
9 all barriers where it is readily achievable to do so, institute policies in furtherance of
10 accessibility or at least have an alternate policy to enable Plaintiff to use the goods and services
11 offered to the non-disabled public so that it provides adequate access to all citizens, including
12 persons with disabilities; and issue a preliminary and permanent injunction directing
13 Defendants to maintain its facilities usable by plaintiff and similarly situated persons with
14 disabilities in compliance with federal regulations, and which provide full and equal access, as
15 required by law;

16 2. Retain jurisdiction over the Defendants until such time as the Court is satisfied that
17 Defendants' unlawful policies, practices, acts and omissions, and maintenance of inaccessible
18 public facilities as complained of herein no longer occur, and will not recur;

19 3. Award to Plaintiff all appropriate statutory damages;

20 4. Award to Plaintiff all reasonable attorneys' fees, all litigation expenses, and all costs
21 of this proceeding as provided by law; and
22

5. Grant such other and further relief as this Court may deem just and proper.

Date: January 31, 2011



____ S/Thomas N. Stewart, III _____

Attorney for Plaintiff